

**MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

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**COMPLETE TITLE OF CASE**

STATE OF MISSOURI,

Respondent,

v.

D.W.N.,

Appellant.

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**DOCKET NUMBER** WD69142

**MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

**DATE:** August 11, 2009

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**Appeal from**

The Circuit Court of Daviess County, Missouri  
The Honorable Warren L. McElwain, Judge

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**JUDGES**

Harold L. Lowenstein, James M. Smart, Jr., Victor C. Howard, James E. Welsh, and Mark D. Pfeiffer, Judges, CONCURRING IN MAJORITY.

Thomas H. Newton, Chief Judge, and Joseph M. Ellis, Lisa White Hardwick, and Alok Ahuja, Judges, CONCURRING IN DISSENT.

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**ATTORNEYS**

Jeremiah W. (Jay) Nixon, Attorney General  
Evan J. Buchheim, Assistant Attorney General  
Jefferson City, MO

Attorneys for Respondent,

Craig A. Johnston, Assistant State Public Defender  
Columbia, MO

Attorney for Appellant.

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# MISSOURI APPELLATE COURT OPINION SUMMARY

## MISSOURI COURT OF APPEALS, WESTERN DISTRICT

STATE OF MISSOURI,	)	
	)	WD69142
Respondent,	)	
v.	)	OPINION FILED:
	)	August 11, 2009
D.W.N.,	)	
	)	
Appellant.	)	

Before: Thomas H. Newton, Chief Judge, and Harold L. Lowenstein, James M. Smart, Jr., Joseph M. Ellis, Victor C. Howard, Lisa White Hardwick, James E. Welsh, Alok Ahuja, and Mark D. Pfeiffer, Judges

D.W.N. appeals the trial court's judgment of his conviction for the class B felony of child molestation in the first degree in violation of § 566.067, RSMo Cum. Supp. 2006. On appeal, he presents two points in which he challenges: (1) the trial court's failure to *sua sponte* prohibit a witness from testifying that he believed the victim; and (2) the trial court's submission of Instruction No. 5, the State's verdict director.

**AFFIRMED.**

### **Majority Opinion holds:**

Regarding D.W.N.'s first point, this court concludes that the trial court did not err in failing to *sua sponte* strike Capps's testimony. When one considers the entirety of the evidence of this case, it can hardly be said that the trial court unreasonably declined to take action on its own motion on behalf of the defense when the clear indication of the actions of D.W.N.'s trial counsel reflected a conscious and deliberate choice not to object to Capps's testimony. Accordingly, we find no error, plain or otherwise, with the decision of the trial court to refuse to interject itself *sua sponte* into the advocacy of one of the parties to this case below and, instead, conclude that the trial judge exercised appropriate evidentiary discretion and appropriate judicial restraint.

Regarding D.W.N.'s second point, this court concludes that the trial court erred in submitting Instruction No. 5. By listing genitals and breast in the disjunctive, Instruction No. 5 created a scenario where, in theory, some of the jurors could have found D.W.N. guilty of the offense because he touched the victim's genitals while the rest of the jurors could have found him guilty because they believed he touched her breast. This violated D.W.N.'s right to a unanimous jury. D.W.N., however, did not suffer a manifest injustice from the trial court's error.

**Dissenting Opinion holds:**

The dissent concludes that the improper admission of Investigator Capps's testimony justifies granting D.W.N. a new trial based on prior decisions involving similar testimony, and in particular the decisions in *State v. Churchill*, 98 S.W.3d 536 (Mo. banc 2003), and *State v. Williams*, 858 S.W.2d 796 (Mo. App. E.D. 1993). Under those decisions, plain error mandating a new trial is established here because: (1) the prosecution intentionally and explicitly solicited improper testimony vouching for the child sex-abuse victim's credibility; (2) the prosecution solicited multiple improper vouching statements, and highlighted those statements in its closing argument; (3) the child-victim's prior statements were materially inconsistent; and (4) the prosecution's case depended entirely on the jury's belief in the victim's credibility, because there was no physical evidence or witness testimony to corroborate her allegations.

The dissent argues that the record of this case provides no clear indication that D.W.N.'s counsel did, or may have, failed to object to Capps's vouching testimony for strategic reasons. To the contrary, the defense did not solicit, endorse, or exploit Capps's test for assessing credibility, and the defense's strategy of asking the jury to believe the victim's initial denials of abuse in Missouri was directly contrary to Capps's testimony. In addition, the record suggests that defense counsel did not have a correct understanding of the law regarding such testimony.

**Majority Opinion by: Mark D. Pfeiffer, Judge**  
**Dissenting Opinion by: Alok Ahuja, Judge**

August 11, 2009

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